

Nguyen Hong Quang v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
Q-05-13-01 OF 2015
DAVID WONG, PRASAD ABRAHAM AND MARY LIM JJCA
21 OCTOBER 2016

Evidence — Hearsay — Inadmissible — High Court convicted appellant of murdering captain on board ship based on circumstantial evidence — Whether trial court wrong to have admitted in evidence entire police report of investigating officer which contained matters incriminating accused — Whether statements in report by officer that other crew members told him appellant had killed the captain hearsay and inadmissible as they were never called as witnesses — Whether presence of appellant's DNA on handle of blood-stained knife recovered from ship not conclusive proof appellant committed the murder as knife-handle also contained DNA of unknown third party — Whether doubtful knife was murder weapon as width of blade did not match width of stab wounds on deceased — Whether trial court should not have called for appellant's defence as prosecution failed to prove prima facie case

The High Court had sentenced the appellant, a Vietnamese, to death after finding him guilty of killing the captain of a ship ('the deceased') on board the vessel while it was anchored off the coast of Sarawak. The deceased was found lying dead on the floor of the captain's cabin which was splattered with blood. The death was caused by stab wounds to the chest. There was no eyewitness to the murder. During investigations by police, the chief officer of the vessel, one Ta Trung Minh, had handed over to a police officer, PW13, a blood-stained knife allegedly seized from the appellant. Tests showed that the appellant's blood was on the handle of the knife while blood found on the appellant's body revealed that it came from at least two sources — one from the deceased, and the other, from an unknown third party. In addition to these pieces of evidence, another crew member, Nguyen Van Khiet, implicated the appellant in the murder. However, neither Ta Trung Minh nor Nguyen Van Khiet was called as a witness at the trial. Based largely on the DNA evidence, the High Court concluded that the appellant had committed the murder and called for his defence at the end of the prosecution's case. The trial court held that the appellant's defence failed to raise a reasonable doubt on the prosecution's case. In the instant appeal against the High Court's conviction and sentence, the appellant argued that the trial court did not give maximum evaluation to the totality of the evidence. In particular, the appellant said what Nguyen Van Khiet and Ta Trung Minh had told PW13 to implicate him was hearsay and inadmissible as they were never called as witnesses. The appellant further

- A argued that it was doubtful whether the knife that was handed over to PW13 was the murder weapon because the forensic witness, PW12, had testified that the width of the stab wounds on the victim were between 6–10 cm whereas the maximum width of the knife was only 5.5 cm.
- B **Held**, allowing the appeal, setting aside the decision of the High Court and acquitting and discharging the appellant:
- (1) Whatever was said to PW13 by the two witnesses was hearsay and inadmissible. The trial judge should have expunged that evidence but instead the judge had relied upon it and he could have been prejudiced by it. Without those two witnesses the prosecution had a gaping hole in its case. They were material witnesses to the crime and would have provided vital evidence as to why one of them had concluded that it was the appellant who had killed the deceased. Not only were they not called as prosecution witnesses, they were not even offered to the defence. The prosecution was entitled to call whoever it wished but when material witnesses were not called, the court was entitled to draw inference as it deemed fit. Although no s 114(g) adverse inference was drawn, this court found that the calling of those two witnesses would have helped to fill in the deficiencies in the evidence (see paras 21 & 23).
- (2) The trial judge relied on the presence of the appellant's DNA on the knife handle and the blood of the deceased on the appellant's body but he failed to give due consideration to the evidence elicited from the cross-examination of PW11 relating to the possibility of a third person's DNA on the handle of the knife. This point was not alluded to by the trial judge nor was it explained in re-examination of PW11 as to who that person was or could be. As the prosecution's case was premised on circumstantial evidence, this unexplained third person left a gap in the prosecution's case. Another troubling piece of evidence was the testimony of PW12 (the forensic witness) that the stab wounds on the deceased could have been caused by another weapon as the width of the wounds were from 6–10 cm whereas the maximum width of the knife was only 5.5 cm. This again was not satisfactorily explained (see paras 24–25).
- (3) At the end of the prosecution's case, the prosecution's evidence must be such that if the appellant had remained silent, the court must be willing to convict, ie the prosecution must have proven its case beyond reasonable doubt. Having evaluated the evidence in its totality in the context of the instant murder charge, this court found that the prosecution had not proven a prima facie case and hence the trial court should not have called on the appellant to enter his defence (see paras 22–23 & 26).

[Bahasa Malaysia summary]

Mahkamah Tinggi telah menjatuhkan hukuman mati ke atas perayu, seorang berbangsa Vietnam, selepas mendapati dia bersalah membunuh kapten kapal ('si mati') di atas kapal semasa ia berlabuh di pantai Sarawak. Si mati dijumpati terbaring mati di lantai di kabin kapten yang mana terpercik dengan darah. Kematian si mati disebabkan oleh luka tikaman di dada. Tiada saksi terhadap pembunuhan. Sewaktu siasatan oleh polis, ketua pegawai kapal, seorang yang bernama Ta Trung Minh, telah menyerahkan kepada seorang pegawai polis PW13, sebilah pisau berdarah yang didakwa dirampas daripada perayu. Ujian menunjukkan darah perayu didapati di pemegang pisau manakala darah yang didapati di badan perayu menunjukkan bahawa ia datang dari dua sumber — satu daripada si mati, dan yang lain, dari pihak ketiga yang tidak diketahui. Tambahan kepada keterangan ini, seorang lagi krew, Nguyen Van Khiet, mengaitkan perayu dengan pembunuhan tersebut. Walau bagaimanapun, tidak Ta Trung Minh mahupun Nguyen Van Khiet telah dipanggil sebagai saksi sewaktu perbicaraan. Bersandarkan kepada keterangan DNA, Mahkamah Tinggi menyimpulkan bahawa perayu telah melakukan pembunuhan dan memanggil untuk pembelaannya di akhir kes pendakwaan. Mahkamah perbicaraan memutuskan bahawa pembelaan perayu gagal untuk menimbulkan keraguan munasabah atas kes pendakwaan. Dalam rayuan ini terhadap sabitan dan hukuman Mahkamah Tinggi, perayu mempertikaikan bahawa mahkamah perbicaraan tidak memberikan penilaian maksimum terhadap keseluruhan keterangan. Terutama sekali, perayu mengatakan Nguyen Van Khiet dan Ta Trung Minh telah memberitahu PW13 untuk mengaitkannya adalah dengar cakap dan tidak boleh diterima memandangkan mereka tidak pernah dipanggil sebagai saksi. Perayu selanjutnya menghujahkan bahawa ia adalah diragui sama ada pisau yang diserahkan kepada PW13 adalah senjata pembunuhan kerana saksi forensik, PW12, telah memberi keterangan bahawa lebar luka tikaman ke atas mangsa adalah antara 6–10 cm manakala lebar maksimum pisau hanyalah 5.5 cm.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan membebaskan dan melepaskan perayu:

- (1) Apa jua yang dikatakan kepada PW13 oleh dua orang saksi adalah dengar cakap dan tidak boleh diterima, hakim perbicaraan sepatutnya mengetepikan keterangan itu tetapi sebaliknya hakim telah bergantung terhadapnya dan dia boleh menjadi prejudis. Tanpa kedua-dua saksi, pendakwaan mempunyai jurang luas dalam kesnya. Mereka adalah saksi material terhadap jenayah dan sepatutnya mengemukakan keterangan penting akan mengapa seorang daripada mereka telah menyimpulkan bahawa ia adalah perayu yang telah membunuh si mati. Bukan sahaja mereka tidak dipanggil sebagai saksi pendakwaan, mereka tidak ditawarkan kepada pembelaan. Pendakwaan berhak untuk memanggil sesiapa sahaja yang mereka mahu tetapi apabila saksi material tidak pun

- A dipanggil, mahkamah berhak untuk membuat inferens sewajarnya. Walaupun tiada inferens bertentangan s 114(g) telah dibuat, mahkamah ini mendapati bahawa memanggil kedua saksi itu akan membantu untuk mengisi kekurangan dalam keterangan (lihat perenggan 21 & 23).
- B (2) Hakim mahkamah perbicaraan bergantung kepada kehadiran DNA perayu pada pemegang pisau dan darah si mati di badan perayu tetapi dia gagal untuk memberikan pertimbangan wajar kepada keterangan yang ditunjukkan dari pemeriksaan balas PW11 berkaitan dengan kemungkinan DNA orang ketiga di atas pemegang pisau. Perkara ini
- C tidak disebutkan oleh hakim perbicaraan dan tidak juga diterangkan dalam pemeriksaan semula PW11 tentang siapa orang itu boleh terjadi. Berkenaan kes pendakwaan yang bersandarkan keterangan keadaan, orang ketiga yang tidak dijelaskan meninggalkan jurang dalam kes pendakwaan. Satu lagi keterangan yang boleh diragui adalah testimoni
- D PW12 (saksi forensik) bahawa luka tikaman terdapat pada si mati boleh disebabkan oleh senjata lain kerana lebar luka adalah dari 6–10 cm manakala kelebaran pisau hanyalah 5.5 cm. Ini juga tidak dijelaskan dengan sewajarnya (lihat perenggan 24–25).
- E (3) Pada akhir kes pendakwaan, keterangan pendakwaan hendaklah bahawa jika perayu berdiam diri, mahkamah hendaklah bersedia untuk membuat sabitan, iaitu pendakwaan hendaklah membuktikan kesnya melampaui keraguan munasabah. Dengan menilai keterangan secara keseluruhan dalam konteks pertuduhan membunuh ini, mahkamah mendapati
- F bahawa pendakwaan tidak membuktikan kes prima facie dan oleh itu mahkamah perbicaraan tidak sepatutnya memanggil perayu untuk memasukkan pembelaan (lihat perenggan 22–23 & 26).]

Notes

- G For cases on inadmissible hearsay, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2202–2205.

Legislation referred to

- H Evidence Act 1950 s 114(g)
Penal Code s 302

Appeal from: Criminal Trial No SBW-45–6/3 of 2014 (High Court, Sibuluan)

- I *Orlando Chua (Wong Orlando Chua & Kuok Advocates) for the appellant.*
Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

David Wong JCA (delivering judgment of the court):

A

INTRODUCTION

[1] This is an appeal against the decision of the High Court judge in which the learned judge convicted and sentenced the appellant on the ground that the appellant/accused had failed to raise a reasonable doubt in the prosecution case for murder under s 302 of the Penal Code.

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[2] The charge against the appellant reads as follows:

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That you, NGUYEN HONG QUANG (M) (VIETNAM) (PASSPORT NO B 684829) on the 22nd March 2013, at about 12.30am inside the Vessel MV Brave Ocean, at Tanjung Manis Anchorage, Sungai Rajang, in the District of Sarikei, in the State of Sarawak, did commit murder by causing the death of one, Ngo Trong Cuong (M) (VIETNAM) (PASSPORT NO B 18212593) and you thereby committed an offence punishable under section 302 of the Penal Code.

D

[3] We heard the appeal and after due consideration to respective submissions of counsel, we unanimously allowed the appeal and set aside the order of the High Court and our reasons are these.

E

BACKGROUND FACTS

[4] The facts of the case have been set out by learned DPP in his submission and we adopt it with some appropriate amendments. On 22 March 2013, PW14 Lim Kie Jeong, who was the local shipping agent, was on board on a vessel named Brave Ocean ('the vessel') when he was informed by the crew that something happened in the captain's cabin of the vessel while he was on board. PW14 then went to the captain's cabin and he saw that Captain Ngo Trong Cuong ('the deceased') was lying on the floor, with blood all over parts of the cabin. The deceased was then taken to Sarikei Hospital where PW10 Michael ak Tandang, the assistant medical officer of Sarikei Hospital confirmed the death of the deceased.

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[5] Subsequently, on being informed of a possible crime being committed, PW13 ASP Abdul Samat bin Amit on the same day together with his police team boarded the vessel. PW13 was then informed by PW14 that the place of the incident of the possible crime was inside the captain's cabin at the upper deck of the vessel. PW13 was also informed by the crew of the vessel that the suspect is named Nguyen Hong Quang ('the appellant'), and premised on that information, PW13 arrested the appellant.

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- A [6] PW13 then went to the captain's cabin and found that there were a lot of blood stains on the floor and on the sofa. There were also some blood stains on the walls.
- B [7] The chief officer of the vessel one Ta Trung Minh then informed PW13 that the knife used by the appellant was in his possession and had been seized from the appellant's hand. The said Ta Trung Minh then took PW13 and his police team to his room where he showed PW13, the knife which was subsequently seized as an exhibit.
- C [8] Samples of blood stains were taken from the ears of the appellant and it is undisputed that the DNA analysis from the aforesaid samples revealed a mixed profile that was contributed by at least two sources, one of which was that of the deceased. DNA analysis on the bloodstains found on the seized knife
- D revealed the presence of the DNA of the appellant on the handle of the knife.
- [9] The post-mortem report (exh P35) on the deceased prepared by PW12 the pathologist who revealed that the cause of death was chest injuries caused by stab wounds.
- E HIGH COURT
- F [10] In our view, the High Court judge had correctly set out the elements required to be proved by the prosecution for a prima facie case to be established at the end of the prosecution case. Briefly these elements are these:
- G (1) that the deceased is Ngo Trong Cuong (M) (Vietnam) (Passport No B18212593);
- (2) that the deceased died as a result of the injuries sustained by him? and
- (3) that it was the appellant who had caused those injuries which led to the death of the deceased.
- H [11] In view of the undisputed evidence concerning the identification of the deceased and the cause of death (pathologist report), elements 1 and 2 were easily proven by the prosecution.
- I [12] In respect of the third element as whether it was the appellant who had caused the injuries, the learned judge acknowledged that the prosecution's case was premised on circumstantial evidence as there was no eyewitness to the crime so to speak. Premised on that the learned judge concluded that in his view the totality of the prosecution's evidence is such that it could only be the appellant who had killed the deceased, relying mainly on the appellant's DNA profile found on the knife handle. This is what the learned judge said:

Taking all the above in totality, and considering all the circumstances of the case, the irresistible conclusion points towards no one other than the accused who had inflicted the fatal stab wounds upon the deceased which caused the death of the deceased on the day and time in question. This court was therefore satisfied that the prosecution had proven the ingredients of the offence of murder under s 300 of the Penal Code and punishable under s 302 of the same Code.

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Hence defence was called by the learned judge.

[13] The appellant opted to give a statement from the dock which the learned judge found that it did not raise a reasonable doubt in the prosecution's case and hence convicted the appellant and sentenced him to death by hanging.

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OUR GROUNDS OF DECISION

[14] The main complaint of learned counsel for the appellant was mainly that the learned High Court judge had handed down a 'non-speaking judgment' in that the learned judge had failed to give maximum evaluation of the totality of evidence before him.

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[15] According to learned counsel for the appellant, the learned judge's first failure of maximum evaluation was the failure to realise much of the evidence relied on by the learned judge was in fact hearsay and inadmissible. These evidence were that of the two crew members of vessel, namely Nguyen Van Khiet and Ta Trung Minh. It was submitted that these two crew members were never called as witnesses nor were they offered to the defence of the prosecution case. Hence the learned judge should not have referred to what they have said to PW13 and in the police report ('P37').

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[16] The aforesaid mentioned Nguyen Van Khiet was featured in the learned judge's grounds as follows:

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PW13 was also being informed by the crew of the said vessel that the suspect is named Nguyen Hong Quang, the accused and he was inside his room ie in the engineer's room which was located beside the captain's cabin.

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[17] As for exh p37, the learned judge allowed the full police report to be admitted despite the fact that there was incriminatory evidence contained therein. Those evidence were these. When PW13 went to the crime scene on the vessel, he was informed by Ta Trung Minh, the chief officer of the vessel, that the knife ('P26(A)') was used by the appellant to harm the deceased and it was seized from the appellant's hand.

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[18] Learned counsel also submitted that adverse inference should be drawn against the prosecution for not calling those two witnesses as they would be

- A material witnesses to the prosecution case. Further learned counsel relied on the fact that the maximum width of the knife was up to 5.5 cm while the wounds were from 6–10 cm to submit that P26(A) could not be the knife used in the stabbing.
- B [19] In rebuttal, learned DPP submitted that there was no allegation by the appellant that the two aforesaid witnesses had reasons to frame the appellant of the crime. Further it was submitted that in view of the presence of blood stains of the deceased found on the appellant's body and the appellant's DNA found on the knife's handle, hence the non-calling of the two aforesaid witnesses were
- C non-consequential.
- D [20] In our considered view, there was little doubt whatever was said to PW13 by two aforesaid witnesses were hearsay and inadmissible. This was not disputed by the learned DPP as we did not find anything in his submission to rebut it. That being the case, the learned judge should have expunged those evidence. But that was not what happened here. In fact the learned judge had relied on those hearsay evidence and in our view could have been prejudiced by it. Be that as it may, we went on to examine the remaining evidence in the form
- E of DNA evidence linking to the killing of the deceased and we had asked ourselves the pivotal question of whether it was the appellant who had inflicted the fatal stab wounds to the chest of the deceased.
- F [21] In answering that question, we were fully aware that at the end of the prosecution case, the prosecution's evidence must be such that if the appellant had remained silent, the court must be willing to convict. What that meant, in our considered view, was simply that the prosecution had proven its case beyond reasonable doubt.
- G [22] Having evaluated the evidence in its totality in the context of a murder charge, we had found that the prosecution had not proven a prima facie case to warrant for the appellant to make his defence and our reasons are these. Firstly, without the two vital witnesses mentioned earlier, we found that the prosecution had left a gaping hole in its case. These two witnesses were material
- H witnesses to the crime and would have provided vital evidence as to why one of them had concluded that it was the appellant who had killed the deceased. As to why they were not called, the notes of proceedings did not provide any insight at all. As pointed out by learned counsel for the appellant, it was intimated by the prosecution in its opening statement (at p 5 *Jld* 1) that these
- I two witnesses would be called but at the end of prosecution case, not only were they not called they were not even offered to the defence. In our view, mindful that the prosecution is fully entitled to call whoever it so wishes but when material witnesses were not called, the court is entitled to draw inference as it deems fit. In this case, though we draw no s 114(g) inference, we however

found that the calling of these two witnesses could have help filled in the deficiencies in the remaining evidence which we now deal with.

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[23] As pointed out earlier, the learned judge relied on the presence of the appellant's DNA on the knife handle and deceased's blood stains on the appellant in his findings. With respect, the learned judge failed to give due consideration to the evidence elicited from cross-examination of PW11, the scientific officer, relating to the possibility of a third person's DNA on the handle of the knife. For clarity, we set out the relevant part of the note of proceeding (see Q282 — at p 64 *Id* 1).

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Q281 Referring to page 3 at paragraph (b) of P9. You said in your report 'the DNA profile developed of swab of handle of knife E11 and blood stains indicated on cotton swab E12 revealed that it was a mix profile consistence that a being contributors by at least by two sources'. In other words, that could have been more than two sources?

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A It depends because after the sentence that I said at least two sources, I stated that the sources represented by blood specimen 1 and blood specimen E13 were consistence as being the two contributors which means that only these two person were the two contributors of this mix profile.

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Q282 Referring to paragraph (d) of the same page at P9. It could be ie the blood stains belong to an unknown third party not named by you in this entire report?

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A It could be.

This point was not alluded to by the learned judge nor was it explained in re-examination of PW11 as to who that person was or could be. In view of the fact that the prosecution's case was premised on circumstantial evidence, this unexplained third person left a gap in the prosecution case. Had the two witnesses testified in court, they could have found the missing link to the prosecution case.

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[24] Another piece of evidence which we found troubling was the testimony of PW12 (the forensic witness) that the stab wounds on the deceased could be caused by another weapon as the width of the wounds were from 6–10 cm while the maximum width of the knife was only 5.5 cm. This again was not satisfactorily explained.

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[25] Premised on the above analysis of the evidence, we were of the view that there were merits in the appellant's appeal and hence found that the learned judge should not have called the appellant to enter his defence at the end of the

- A prosecution case as a prima facie case had not been proven. In view of our findings, we did not find it necessary to comment on the unsworn statement of the appellant.

CONCLUSION

- B [26] For reasons stated above, we find that the conviction unsafe. Accordingly, we allowed the appeal and set aside the High Court order. The appellant is acquitted and discharged.
- C *Appeal allowed, decision of High Court set aside; appellant acquitted and discharged.*

Reported by Ashok Kumar

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